Taracorp Industries, A Division of Taracorp, Inc. *and* **Fred Elmore.** Case 14-CA-13551

July 31, 1981

DECISION AND ORDER

On November 28, 1980, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Taracorp Industries, A Division of Taracorp, Inc., Granite City, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following at the end of paragraph 2(b):

"(See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)"

2. Insert the following as paragraph 2(c) and reletter the following paragraphs accordingly:

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on July 16 and September 22, 1980, at St. Louis, Missouri, on complaint of the General Counsel against Taracorp Industries, A Division of Taracorp, Inc., herein called the Respondent or the Company. The complaint issued on May 7, 1980, based upon a charge filed on March 3, 1980, by Fred Elmore, an individual, herein called the Charging Party. The issue presented is whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging the Charging Party. Briefs were filed by the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a State of Missouri corporation, is engaged in the manufacture, sale, and distribution of fabricated lead products and related products; one of its plants is located in Granite City, Illinois, the only one involved in this proceeding. During the calendar year ending December 31, 1979, a representative period, the Respondent, in the course of its business at this location, sold products valued in excess of $50,000 which were shipped from said plant directly to out-of-state locations. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Local 6496, United Steelworkers of America, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Fred Elmore, who filed the charge in this case, worked as a feeder for the Respondent from November 1978 to September 1979. His job was to place used batteries, which arrived in large quantities, on an upward moving belt which took them into the next operational part of the plant. Occasionally, the belt would become jammed, and stop. It was then the duty of the feeders—there were more than one on every shift—to get the belt moving, and one of the ways to do this was to pull on the belt so it would get going again. If their efforts failed, someone would be called from the maintenance department and that person then took over and did

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] For the reasons stated in his dissent in *Kraft Foods, Inc.*, 251 NLRB 598 (1980), Member Jenkins joins his colleagues in granting a full make-whole remedy.

[3] The Administrative Law Judge found that Respondent, prior to discharging employee Elmore, conducted an unlawful investigatory interview. Thereafter, he consistently denominated the interview as "investigatory" except in one part of the Decision. In the first Conclusion of Law the Administrative Law Judge inadvertently refers to a "disciplinary" interview. We hereby correct this inadvertent error and insert "investigatory" in place of "disciplinary."

In addition, the Administrative Law Judge inadvertently failed to include in his recommended Order the citation of case authority for the rationale on interest payments and the Board's customary records-preservation language. We shall modify the recommended Order accordingly.

Finally, we find it unnecessary to rely on certain findings by the Administrative Law Judge as support for his ultimate conclusion that Respondent violated Sec. 8(a)(1) of the Act by denying employee Elmore a union representative at an investigatory interview. We do not rely on the Administrative Law Judge's finding that Respondent developed a "new" theory at the hearing to explain its actions. Nor do we draw any adverse inference from Respondent's failure to call Manager Harper as a witness at the hearing. Moreover, we do not adopt his reference to possible "bargaining" during the interview, since no such issue was presented here.

whatever was necessary to start the belt operating properly.

Early in the morning of September 12, 1979, when Elmore was on duty, the belt stopped. Gregg Vaughn, the department supervisor, tried to get it going again; another feeder, Mark Donithan, helped Vaughn pull on the belt, but without results. At this point Vaughn called to Elmore, who was just standing by and watching, and told him to help pull on the belt. Elmore refused—plain and simple. About 30 minutes later, perhaps 8 o'clock, on complaint of Vaughn, Charles Harper, the manager, in his office fired Elmore.

The complaint lists a number of unfair labor practices said to have been committed by the Respondent, all as part and parcel of this single incident. When Elmore disobeyed Vaughn's order to work, the supervisor told him he was then and there suspended and that he should present himself in the manager's office at 8 o'clock. When Elmore appeared there, the first thing he said was that he wanted George Siler, president of the union local and also an employee, to be present. Harper refused his request. At one point the complaint very precisely alleges that the reason why the Respondent discharged the man was because he asked to have his union agent in attendance at the investigatory interview. And in support, the General Counsel relies upon *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

The complaint also alleges that the reason why the Company discharged this man was "in order to discourage employees from engaging in . . . union and/or concerted protected activities. . . ." These words state no more than a conclusion of law, indeed in the very words of the statute. Somewhat belatedly, the General Counsel, in her post-hearing brief, for the first time sets out what belonged in the complaint; i.e., the alleged conduct which, it is argued, constituted the illegal acts committed by the Respondent—and it is a double-barreled assertion. The first is that the Company discharged Elmore because he sought to enforce the terms and conditions of the collective-bargaining agreement then in effect. For this allegation the General Counsel relies upon *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), and *H. C. Smith Construction Co.*, 174 NLRB 1173 (1969). The second allegation now is that Elmore was discharged for having raised an issue of safety—like the employee who seeks to go to OSHA, or some other governmental, regulatory agency having to do with his employment. Now the governing precedent is quoted as *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), and its progeny.

In such circumstances, I think it best to consider the evidence, decide what the facts of record are, and apply current applicable law.

What Happened When the Belt Got Stuck?

There is a conflict in testimony between Vaughn and Elmore as to what was said between them at that critical moment. According to Vaughn, when he asked Elmore to help pull on the belt, the employee answered "it's not my job." When he ordered the man to pull a second time, again he got no more than the same words: "It's not my job." With this, as Vaughn continued to testify, he told the man he was suspended and should report in the manager's office. Vaughn said Elmore never once spoke of safety during the incident.

As Elmore recalled it, when Vaughn "yelled for me to come down and pull on the belt," he (Elmore) "told him I couldn't pull on the belt, that it was unsafe and that it wasn't my job. They should get maintenance over to fix it." When Vaughn repeated "Get down there and help pull on the belt," Elmore again said, "I can't. It's unsafe." With this, still according to the employee, Vaughn "came up to me" and three times accused him of "refusing to work," and each time he responded that he was "not refusing." Finally, with the supervisor insisting that he was refusing, Elmore said: "Take it whichever way you want to but I am not refusing." It was at this point that Vaughn told him he was suspended and to be in Harper's office at 8 o'clock.

On this precise issue of what was said at that time of friction, I credit Vaughn against Elmore. In the heat of the moment, with Vaughn tensed at being unable to pull the belt with only one helper and yelling for assistance, I doubt Elmore even had the time to articulate four reasons for flouting his supervisor's authority—that he could not do it, that it was not safe, that it was not his job, and that maintenance should be called. As a witness speaking 10 months after the events, and after extended opportunity to reflect upon his conduct, he was spelling out virtually the totality of the legal arguments now said to support his complaint. There are other reasons for this credibility resolution.

It is plainly not true that pulling the belt was not "his job." As he himself conceded, Elmore had always pulled the runner throughtout his employment. How can one credit a plain lie? And certainly "he could do it," because he always had done it. Moreover, it does not appear he had any reasonable basis for saying it was not "safe." No one had ever been hurt on that moving belt as long as he worked there. Someone had once hurt his hand on another belt, but I do not know for a fact that all the belts in the department are alike. The union contract that covered his employment recognized the fact there might sometimes be an element of risk in the job he was paid to do and, when necessary, maintenance was called and did fix the belt. But there is no evidence in the least indicating any particular danger in this situation at that particular moment.[1]

But what in my considered judgment serves more than anything else to deprive Elmore of all credibility on this one precise question is his repeated statement that he did not "refuse" to do the work he was ordered to do. It is one thing to discourse obliquely, evasively, about reasons for doing or not doing something; it is something else again to call black white, to distort the meaning of plain words to the point of incoherence. It was not possible even at the hearing to get the witness to admit he did in fact refuse to do what Vaughn ordered him to do. The

[1] A generally applicable phrase in the Steelworkers contract in effect at the time recognizes that there may be a "normal hazard inherent" in some of the jobs covered. The fact that the contract also says no man is required to work under "unsafe" conditions hardly serves to prove, as the prosecution side seems to contend, that there in fact existed such an unsafe condition that particular morning.

only rational explanation for such blatantly artificial testimony is that, conscious of the impact which his straight refusal to perform an allotted task must of necessity have upon the decision in this case, the witness was seeking a way out, however hollow his words sounded.

Donithan, the other employee, who was pulling the belt with the supervisor, testified he heard Elmore say "it wasn't safe or similar words." Again, from this man's testimony about when Vaughn asked was Elmore willing to work: ". . . I am not refusing to do work but it's not safe, something like that." This "something like that" kind of testimony will not do. I still credit Vaughn, instead, and find that Elmore did not speak of safety then.

There is something else in Donithan's testimony strongly indicating that all that happened was an outright refusal by Elmore to obey a plain work order. "I remember Gregg saying, 'You are terminated,' and that scared me right there because I knew what that meant because I was pulling on the belt too." This was the witness saying he very well appreciated his fellow employee had done nothing more than flout a proper order and could expect nothing short of dismissal.[2]

The basic question in this case is: Why was Elmore fired? When he and Vaughn appeared in the manager's office, Harper asked them what had happened, and each of them, as they testified, gave the same version of the incident that they related at this hearing—Vaughn saying the man had simply refused a work order and Elmore saying that he had not refused to do what he was told. Harper believed Vaughn. Now, while it is true, as will appear below, that Elmore asked to have the union president present and that Harper denied his request, there is no evidence in the least indicating that the manager's reason for discharging him was his reference to the union agent. It is purely a conclusionary statement appearing in the complaint and nothing more. Indeed, the affirmative proof of the employee's outright insubordination is so clear that there can be no finding other than that Elmore was discharged for perfectly lawful, just cause. This is not a case calling for lengthy analysis of pretext, dual motives, mixed causes, or other such analytical introspection. Compare *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980). "Union" activity, "concerted" activity, or "protected" activity—however multiple the complaint allegations may be—had nothing to do with the Respondent's reaction to this man's outright improper insubordination.[3]

As to the further allegation—first appearing in the General Counsel's brief—that Elmore was fired because of his "assertion of a contract right," the brief concedes the man's "not articulating chapter and verse" re the contract. A more correct statement as to that is that the entire record contains not a scintilla of proof.

I find it a fact Elmore was discharged for refusing to perform a duty falling squarely within his employment, and I shall therefore recommend dismissal of the complaint allegation of a violation of Section 8(a)(3) of the Act.

What Happened in the Manager's Office?

The only other substantive allegation of wrongdoing that I see in this complaint is that Harper's refusal to permit Local President Siler to be present at the 8 o'clock interview was a violation of Section 8(a)(1). There is a very significant connection between the two questions—why the discharge and did Harper in fact refuse a request? When Vaughn, offended by Elmore's misbehavior, reacted by ordering him to the office, his first outburst was that Elmore was "terminated." As Elmore recalled it, the supervisor said: "You are terminated. No, hold it, I take it back. You are suspended termination [sic]." If there is one thing Elmore knew at that moment, it is that his job was hanging by a thread. This is the same impression Donithan, the other belt feeder, formed in his mind. It was to be expected, therefore, that Elmore would seek help from somebody to try to save himself. In fact, in a matter of minutes he was looking for union assistance of one kind or another. Vaughn saw him talking to Ricky Epperson, a union committeeman, and told him not to disturb others at work and to get out of the work area as he had been ordered.[4] Vaughn saw him again in the yard a few minutes later, and asked what was he doing there. Elmore said he was "looking for George Siler." This is from Vaughn's testimony. Elmore put it more explicitly, and there is no reason for not believing his version, "I told him I was going to get George Siler because I wanted George Siler to go with me to Charlie Harper's office."

We come to the disagreement between Vaughn and Elmore as to what was said later in the manager's office. Harper himself did not testify. Elmore said he entered the office first and was immediately followed by Vaughn. His testimony is that the first thing he said was "I want George Siler up here," and that Harper answered, "You don't need George Siler up here. This is just to determine whether you are fired or not." In contrast, Vaughn testified it was not until after Harper had

[2] On this reality that Elmore refused to do what he was told to do, the testimony of the Charging Party was not enhanced by the General Counsel's evasive tactics on the record. Immediately following Donithan's testimony set out above, came the following:

> JUDGE RICCI: Is it your position, Ms. General Counsel, that meant that he refused to do what he was told to do that day?
>
> Ms. THURROTT: It is our position that Mr. Donithan overheard the conversation.
>
> JUDGE RICCI: It will be better if you answer my question. Is it your contention that Elmore that day did not refuse an order of his supervisor to do what he was told to do?
>
> Ms. THURROTT: We are saying he kept saying that he wasn't refusing but he wouldn't do the job because it was unsafe.

[3] A reasonable argument could be made that in one way or another Elmore did mention the word "safety" at some point in his running dialogue with the supervisor, for the record otherwise shows no reason why he disobeyed the way he did. But even were I to assume he did passingly refer to safety, I would nevertheless find he was not fired for such reason. The test always is "causal relationship," and there is absolutely no basis for connecting that idea with the discharge in this case.

[4] This passing remark by Vaughn—that Elmore should stay out of the work area as a suspended employee and not interfere with the duties of others who were on the clock—is listed as a separate unfair labor practice chargeable to the Respondent. Elmore had accosted Epperson to ask that he help find the union president. I make no finding of misconduct by anyone in that little byplay, for I am at a loss to understand how Elmore's very passing talk with his fellow employee becomes a "meeting" of employee and "union representative," illegally "interrupted" by management, to quote the words of the complaint.

asked each of them what had happened, and even said, "You are terminated," that Elmore "asked if George Siler had been notified." It ended, as Vaughn would have it, with the manager saying, "You don't need George Siler. You have already been terminated. It's too late for George Siler."

Despite my finding that Elmore told a made-up story about his quarrel with the supervisor at the belt machine a half hour earlier, I must believe he asked for, and was denied, the presence of his union agent at the start of the investigatory interview. He had reason to be, and in fact was scared for his job. He had gone looking for the union agents, both Epperson and Siler, in the interval between refusal to work and confrontation with the big boss. The logical thing for him to do, in the circumstances, was to try to get help from his union before he was fired, not after. After the final decision adverse to him was made, what good would it have done him whether Siler knew, or did not know, what happened? Credibility resolutions following conflicting stories told by human beings rest essentially on what appears as the more likely, rational behavior of the disputing witnesses based on general experience.

Vaughn said Elmore was sitting outside Harper's office when he arrived, but that he left him out there and went in to talk to the manager alone. Why should he do that, if the very purpose of sending the employee there was for Harper to learn both stories? The tidbit fitted the Respondent's new theory of defense perfectly. Vaughn tried to add that after he told Harper what had happened, Harper articulated his decision to fire the man. With this, it is now argued that this was not an investigatory or a disciplinary interview at all, but just an occasion to inform the employee of a final discharge decision already made. Why was Harper not called as a witness? Like Elmore, the Respondent's witness also had had 10 months between the events and the hearing to ponder upon what his testimony would be. I find that the employee did ask, at the start of the interview, to have Siler present and that Harper refused his request.

Vaughn had no power to discharge anybody. In fact, that is why he was careful to tell Elmore, when the refusal to work took place, he was not fired. This means, of course, Harper had to make the decision. Vaughn testified that he spoke to Harper on the phone before going to the office to tell him "what had happened." All Harper said then, if in fact Vaughn did call him, was ". . . if Fred Elmore refuses to do the job, that's termination." This is the beginning evidence that Harper did not decide what to do before the interview with the employee. For him to say "if," means he intended first to find out "what had happened."

Again, still from Vaughn's testimony, after entering the office he "repeated to Charlie Harper what had taken place earlier," and again the manager's stated response was: "*If* he refuses to do the job, that's termination." (Emphasis supplied.) When, after Elmore was let into the office, Vaughn again told Harper "what had taken place," the manager asked Elmore "[i]f this was true." If this was not the deciding authority inquiring of the two contestants just what their conflicting stories might be, I do not know what phrase "investigatory interview" means.

All this is consistent with Elmore's testimony. He said that upon entering the office, just before Vaughn came in, Harper asked him "[w]hy I was there. . . . I told him Greg Vaughn had put me on suspended termination." And when Vaughn came in Harper asked the same question of him. "I waited until he got done with his story and then Charlie Harper asked me mine. I told Charlie Harper exactly what had happened." At this juncture, there is no point in repeating what Vaughn and Elmore told the boss; each gave the same version related at the hearing later. Without further ado, Harper told Elmore he was discharged.

I find that by the manager's rejection of Elmore's request to have his union agent present at the start of this interview, the Respondent violated Section 8(a)(1) of the Act.

As to the separate allegation that the reason why the Company decided to discharge Elmore was the fact he asked for the union agent, or, however phrased, sought to engage in union activity, I find there is no supporting proof at all. Motivation means a state of mind. The one subject Harper for sure did not care about at all at that moment was the fact Elmore was thinking union. He was simply indifferent to that subject then.

What Happens Now?

The Respondent must be ordered not only to stop committing the kind of unfair labor practice here found,—i.e., refusing an employee's request for union representation at the start of an investigatory interview—but it must also be ordered to reinstate Elmore to his old job and make him whole for lost earnings. This is current Board law. *Southwestern Bell Telephone Company*, 251 NLRB 612 (1980).

I can understand counsel for the Respondent saying, in his brief, that the Board's policy of ordering reinstatement in cases of this kind "is wrong." He knows this employee was discharged for misbehavior and deserved to be dismissed. But what he conveniently overlooks is the purpose of union representation, which goes to the heart of the Act. Had Siler been present at the investigation interview, he would have made some attempt to soften the blow, to persuade Harper, if not to complete forgiveness, at least to a lesser form of discipline. He never had the chance. It would be pointless for me to speculate what the result of bargaining—to use a phrase from the statute—might have had. I do not know; I cannot know. Neither can anyone else.

And this is precisely what the Supreme Court said in *Weingarten* in sustaining the Board's policy which the Respondent now seeks to avoid. "A knowledgeable union representative could assist the employer by eliciting favorable facts . . . . After the employee has been discharged or otherwise disciplined . . . . It becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished." And the Board's recent decision in *Coyne Cylinder Company*, 251 NLRB 1503 (1980), does not help the Respondent here. In that case, during the *Weingarten* in-

terview, the employer learned nothing it did not know before. In the case at bar, the manager, who alone had authority to discharge, knew nothing of what had happened and only learned of what then in his judgment became grounds for discharge after the start of the interview.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By requiring an employee to participate in a disciplinary interview without union representation, where such union representation was requested by the employee, and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action, the Respondent has violated Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Taracorp Industries, A Division of Taracorp, Inc., Granite City, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Depriving any employee of his right to union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Fred Elmore immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole Fred Elmore for any loss of earnings he may have suffered by reason of the Respondent's discrimination against him. The amount of backpay due shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

(c) Post at its place of business in Granite City, Illinois, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that in all other respects the complaint be, and it hereby is, dismissed.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT deprive any employee of his right to union representation at an investigatory interview which the employee reasonably believes may result in disciplinary action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Fred Elmore immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; and WE WILL make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, plus interest.

TARACORP INDUSTRIES, A DIVISION OF TARACORP, INC.